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Supreme Court, U.S.
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No. 07-1506

In the Supreme Court of the United States

STEPHEN M. BELL,

PETITIONER,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

The brief in opposition essentially concedes that certiorari is warranted. Respondent acknowledges that the *en banc* Sixth Circuit held that criminal defendants are charged with knowledge of any evidence that is "publicly available" or "reasonably available" from another source, and that prosecutors have no obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose such information even if it is exculpatory. Respondent concedes that that holding is the subject of a square and acknowledged circuit split, although he disputes how particular circuits line up. And he essentially concedes all the critical facts—that the government's star witness unilaterally approached the prosecution with an offer of testimony in this case in exchange for leniency on pending charges and help with parole, that the prosecution granted leniency and assistance, and that none of this was disclosed to Bell despite his timely request for all exculpatory and impeachment evidence in the government's possession. Indeed, the prosecution affirmatively assured both Bell and the jury that no such evidence existed.

Respondent's effort to reconcile the Sixth Circuit's holding with this Court's decisions (and with the decisions of other conflicting circuits) rests on a fundamental misunderstanding of the question reserved by this Court in *Strickler v. Greene*, 527 U.S. 263, 287–88 (1999). In *Strickler*, this Court reserved decision on whether a defendant could make out a *Brady* claim if he had actual knowledge of the factual basis for that claim but simply lacked documentary or other *proof*—and could have obtained that proof from reasonably available sources. That question arose in the context of the "cause and prejudice" standard for

excusing a prior procedural default on federal *habeas* review, and the scenario this Court had in mind was a defendant who was told, for example, that the prosecution's star witness had been granted leniency for his testimony but simply was not given the sentencing records necessary to prove it. A defendant in that situation may lack "cause" for failing to assert on direct review a *Brady* claim premised on the prosecution's failure to turn over the sentencing records.

Properly understood, however, that has nothing to do with a case like this one—where the defendant was not even told the witness had been granted leniency, and in fact was affirmatively misled on that issue. Respondent, like the Sixth Circuit below, leaps from this Court's suggestion that a defendant with *actual knowledge* may not have a viable *Brady* claim to the unwarranted conclusion that a defendant is barred by *constructive knowledge* of the factual basis for his claim—and then charges all defendants with constructive knowledge of everything that is theoretically available somewhere in public records, even if the defendant does not know the information is available and has been assured by the prosecution that it does not exist.

The Sixth Circuit's rule conflicts with decisions of this Court and further entrenches a mature eleven-circuit conflict. The Sixth Circuit has applied the rule adopted here in subsequent cases. *See* Pet-27;[1] *Lewis v. Tennessee*, No. 05-5661, 2008 WL 698935, at *2 (6th Cir. Mar. 14, 2008), petition for cert. filed July 28, 2008

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[1] "Pet-" references the Petition for a Writ of Certiorari; "BIO-" references the Brief in Opposition; and "CAJA-" references the Joint Appendix in the Sixth Circuit.

(No. 08-119); *Johnson v. Bell*, 525 F.3d 466, 477 n.8 (6th Cir. 2008) ("[A]s this document was publically [sic] available, it simply does not present a *Brady* issue."). The rule is inconsistent with the practical realities of the criminal process, reintroduces the same incentives for prosecutorial gamesmanship that *Brady* was designed to eliminate, and will infect countless disclosure decisions made on the front lines of the criminal justice system on a daily basis until this Court grants review to correct it. Certiorari is warranted.

1. Respondent does not dispute any of the key facts, including that:

- Davenport unilaterally solicited a meeting with prosecutors and made demands for leniency in return for providing testimony against Bell;
- the prosecution met twice with Davenport and shortly after the meetings four pending charges against Davenport were dropped and he received vastly reduced sentences on two other pending charges;
- the prosecutor wrote a letter to the parole board requesting parole for Davenport at the earliest possible date because his testimony was essential to Bell's conviction;
- *none* of this was disclosed to Bell, despite defense counsel's explicit request for such information, and that Bell had no actual knowledge of any of it;
- the prosecutor further misled Bell and bolstered Davenport's credibility by falsely telling the jury that Davenport had no ulterior motive for testifying, that the defense's suggestion that Davenport "wants

early parole through our office or through me" was not true, and that his office had no "say-so with the Parole Board"; and

- the evidence at issue in this case was impeachment material under *Brady*, and nondisclosure obviously prejudiced Bell because Davenport's testimony was the only evidence of identity and motive and the only evidence establishing the premeditation sufficient for the first-degree murder conviction.

Those undisputed facts make this case an ideal vehicle for this Court to resolve the entrenched conflict over whether prosecutors have an obligation under *Brady* to disclose all exculpatory and impeachment material in their possession, even information that is theoretically available somewhere in public records if the defendant knew to look (and where to look).

2. Most of the brief in opposition is built on a misunderstanding of the question this Court reserved in *Strickler*, which was whether "cause" might be negated if the defendant had actual knowledge of the factual basis for his *Brady* claim, and the ability to obtain the necessary *proof* through the exercise of reasonable diligence. 527 U.S. at 287–88. Respondent concedes that the Sixth Circuit and the First, Second, Third, Seventh, Eight, and Eleventh Circuits have transformed this possible exception related to *actual knowledge* into a holding that "cause" is negated whenever the evidence was "publicly available" or "reasonably available" from another source. Pet-19–27. The rule in these circuits effectively charges defendants with *constructive knowledge* of all materials

in public files or that hypothetically could have been discovered with a diligent investigation.

Respondent argues that a defendant has "access to" all exculpatory and impeachment evidence that does not reside *exclusively* in the prosecution's possession, BIO-21, and that such "access" absolves the prosecution of any disclosure obligation under *Brady*. His position appears to be that anything that is "publicly available" or "reasonably available" from another source through a defendant's diligent investigation is not in the prosecution's possession, and therefore the prosecution cannot be accused of playing "hide and seek." BIO-12–13, 21.

This is sophistry, and a frontal assault on the core holding of *Brady*. In light of the prosecutor's special role in the criminal process, this Court held in *Brady* that the prosecution is required to disclose *all* exculpatory or impeachment material in its possession in order to eliminate strategic gamesmanship that undermines the search for truth. Pet-13–14. This Court has never suggested that prosecutors can pick and choose what to disclose by speculating about what the defendant might be able to locate elsewhere with a "reasonably" diligent independent investigation. The whole point of *Brady* is that the prosecution has no legitimate interest in withholding *any* exculpatory or impeachment evidence from the defense, and that justice is best served if criminal trials are conducted with all such evidence out in the open.

Respondent's position, and that of the Sixth and several other circuits, invites prosecutors to play exactly the games that *Brady* was designed to eliminate. Indeed, it would allow prosecutors to withhold essentially any exculpatory or impeachment

material from the defense simply by placing it in an archive theoretically open to the public. (The government warehouse at the end of *Raiders of the Lost Ark* comes to mind.) And it requires reviewing courts to engage in impossible line-drawing exercises about just how accessible the evidence was, and just how much knowledge the defendant had.

The rule adopted by the Sixth Circuit is also simply inconsistent with the realities of criminal practice. Criminal defendants do not have the time or the resources to slog through public records located in the basements of courthouses or elsewhere. Most are incarcerated, and represented by appointed counsel who are struggling with case loads that preclude substantial independent investigation. *See, e.g., Lewis v. Tennessee*, Petition for a Writ of Certiorari at 22 n.5 (U.S. No. 08-119) (noting that a defense attorney in the Bronx office of the Legal Aid Society of New York maintains an open file of approximately 105 cases; public defenders in Louisiana and Massachusetts face maximum workload standards of 200 felonies and 400 to 450 misdemeanors per year, and public defenders in Oregon will handle up to 240 felonies and 400 misdemeanors per year). And Respondent's assertion that a search of public records is not really "any investigation whatsoever" is absurd. *Lewis* illustrates the point: the Sixth Circuit applied the holding in this case to fault a defendant for not uncovering a report in the NCIC database, access to which is subject to strict legal limitations. *Lewis* Pet. 7 & n.1.

3. Respondent argues that this case does not conflict with *Strickler* or *Banks v. Dretke*, 540 U.S. 668 (2004), because those "cases involved information known only by the prosecution that was hidden or

concealed from the defendant." BIO-12. In contrast, Respondent claims, "the information at issue in this case 'was a matter of public record'" and therefore not "hidden or concealed" from Bell. This reasoning only demonstrates how untenable the Sixth Circuit's rule is.

In *Strickler*, the government argued that "an examination of [the prosecution witness's] trial testimony, as well as a letter published in a local newspaper"—clearly publicly available information—put the defendant on notice of the factual basis for his claim and required him to investigate further. 527 U.S. at 284–85 (footnote omitted). But this Court held that although Strickler's lawyers "must have known that [the witness] had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that [the witness] sent to the detective, existed and had been suppressed." *Id.* at 285. Likewise here, although Bell's counsel obviously knew that Davenport was incarcerated, it by no means follows that he should have had knowledge that Davenport had sought out the prosecution and requested numerous favors in return for his testimony; that the prosecution then dropped four pending charges against him and entered a favorable plea agreement on two others; and that it intended to support his parole application in return for his testimony. Pet-17.

Respondent also does not dispute that the prosecution represented to Bell's counsel that it had turned over all *Brady* material in its files. Both *Strickler* and *Banks* hold that Bell "cannot be faulted for relying on that representation." *Banks*, 540 U.S. at 693, 696 ("A rule ... declaring 'prosecutor may hide,

defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Like *Strickler*, where the prosecution continued to represent throughout the litigation that it had complied with its *Brady* obligations, at Bell's trial the prosecutor falsely told the jury that Davenport had no ulterior motives for testifying, that the defense's suggestion that Davenport had sought early parole from the prosecution was not true, and that the prosecution's office had "no say-so" with the parole board. Pet-18.

Respondent concedes that the Sixth Circuit expressly held that Bell was not entitled to rely on these representations, BIO-14, and embraces the position that "any such reliance [on the prosecution's representations of compliance with its *Brady* obligations] would not have been reasonable given the public availability of the evidence," BIO-21. Despite the prosecution's representation that the specific evidence at issue *did not exist*, Respondent asserts that Bell "had every reason to" seek it out—which appears to be another way of saying that criminal defendants have every reason to assume that prosecutors are lying. This Court said *the exact opposite* in *Strickler* and *Banks*, and Respondent forthrightly concedes that the Sixth Circuit's holding conflicts on this point with the holdings of at least *seven* courts of appeals. BIO-21 & n.13; Pet-28–31; *Strickler*, 527 U.S. at 283 n.24; *Banks*, 540 U.S. at 693, 696, 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

Respondent's only real defense is a misleading and demonstrably false assertion that Bell's trial counsel "expressly disavowed reliance on the representation of the prosecutor" and testified "that it was reasonable for the prosecution to expect that petitioner would obtain this information on his own." BIO-15. But Bell's trial counsel testified that he "really expected ... if there was information relevant to [his discovery request]" that "the prosecutor would have turned over this kind of information," and that he had "no basis to believe" that the prosecution had withheld any impeachment evidence about its favorable treatment of Davenport. CAJA-445. Respondent quotes trial counsel's response to a question about whether he could hypothesize any reason why the prosecution would not have turned over the evidence. Counsel responded that it would not surprise him "if the *DA's position*" was that he should uncover it himself, but that he "really expected" the prosecution to turn over the evidence he requested "if there was information" that existed. *Id.* (emphasis added).

4. Respondent concedes the existence of a square and acknowledged circuit split, and argues only that the petition "overstates the dimension of any such split." BIO-15. Respondent agrees that the Sixth Circuit's decision is consistent with the law in the First, Second, Third, Seventh, Eighth, and Eleventh Circuits, and that the Ninth Circuit's decisions are in conflict. His attempts at distinguishing the conflicting cases from the Fourth and Tenth Circuits are unpersuasive. Respondent's analysis of the Fifth Circuit cases demonstrates that court's confusion.

First, Respondent does not dispute that the Fourth Circuit's decision in *Walker v. Kelly*, 195 Fed. Appx.

169 (4th Cir. 2006), is irreconcilable with the Sixth Circuit's decision. He argues only that the decision is unpublished and that the Fourth Circuit's published decision in *Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir.), *cert. denied*, 516 U.S. 972 (1995), still governs. BIO-16–17. But in *Walker* the Fourth Circuit originally applied its holding from *Barnes*, but then completely reversed course when this Court granted, vacated, and remanded the case in light of *Banks*. 546 U.S. 1086 (2006). The Fourth Circuit then rejected its prior decisions and held that the defendant's knowledge is irrelevant to the prosecution's disclosure obligations. *Compare Barnes*, 58 F.3d at 976 ("Even assuming 'some interference by officials' ... a petitioner still cannot show cause if the information sought is otherwise reasonably available."), *with Walker*, 195 Fed. Appx. at 175 ("[T]he cause analysis focuses on prosecutorial misconduct, not on the defendant's diligence."). The Fourth Circuit obviously felt no need to publish its second *Walker* opinion because it believed that holding to be clearly required by *Banks*. There is every reason to believe subsequent Fourth Circuit panels will reach the same conclusion.

Second, Respondent claims that the Tenth Circuit's decisions are not inconsistent with the Sixth Circuit's decision here because the Tenth Circuit rejected a *Brady* claim where the exculpatory evidence was "known" to the defendant. BIO-18. Respondent further asserts that the Tenth Circuit's cases can be reconciled with the Sixth Circuit by modifying the Tenth Circuit's holding that a defendant cannot prevail if he "already has a particular piece of evidence," to a holding that a defendant cannot prevail if he "already has ['access to'] a particular piece of evidence." BIO-19

& n.11. Of course that reasoning illustrates Respondent's fundamental misunderstanding, and shows precisely why Tenth Circuit precedent *is not* consistent with the Sixth Circuit's holding here.

Third, Respondent points to the Fifth Circuit's decision in *United States v. Infante*, in which the prosecution failed to turn over evidence that the government's "star witness" had sought a psychiatric exam in a related case. 404 F.3d 376, 387 (5th Cir. 2005). The Fifth Circuit rejected Infante's *Brady* claim because the information was in the co-conspirator's case file which "was a matter of public record[] that he could have obtained ... upon request." *Id.* Ten days earlier, however, the same court held that information's "'location in the public record, in another defendant's file, is immaterial,'" to whether the prosecution violated *Brady*. *Mathis v. Dretke*, 124 Fed. Appx. 865, 877 (5th Cir.) (citation omitted), *cert. denied*, 545 U.S. 1131 (2005). And in *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004), the Fifth Circuit held that: "In finding procedural default, the district court relied upon the fact that [the accomplice's] stipulation was available in the public record. However, if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." Respondent succeeds, therefore, only in showing that the Fifth Circuit is hopelessly confused.

5. Respondent also does not dispute that the Sixth Circuit and other courts of appeals have conflated the habeas standards for cause and prejudice with the substantive scope of a prosecutor's *Brady* obligations in the first instance—thereby importing the habeas rules into cases on direct review or with no procedural

default. *E.g.*, *United States v. Coker*, 514 F.3d 562, 570 (6th Cir. 2008); Pet-20–23. This Court could easily clarify the applicable principles in the course of resolving this case.

CONCLUSION

The *en banc* Sixth Circuit decided a question of enormous daily practical importance to the administration of justice, in conflict with decisions of this Court and other courts of appeals. The circuit conflict is deep and robust, and the Sixth Circuit's position is profoundly and dangerously wrong. The petition for certiorari should be granted.

Respectfully submitted,

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